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NTSB Order No. EA-4983

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of July, 2002

_____)	
JANE F. GARVEY,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-16595
v.)	
)	
DALE L. WHITTINGTON,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator and respondent both appeal the oral initial decision of Administrative Law Judge William A. Pope, II, rendered in this emergency revocation proceeding, after an evidentiary hearing, on June 19, 2002.¹ By that decision, the law judge upheld respondent's alleged violation of sections 61.16(b) and 91.17(c)(1) of the Federal Aviation Regulations ("FARs"), but modified respondent's sanction to a 90-day

¹ An excerpt from the hearing transcript containing the law judge's decision is attached.

suspension of his commercial pilot certificate.² We deny the

² The relevant provisions of FAR sections 61.16 (14 C.F.R. Part 61) and 91.17 (14 C.F.R. Part 91) state:

§ 61.16 Refusal to submit to an alcohol test or to furnish test results.

A refusal to submit to a test to indicate the percentage by weight of alcohol in the blood, when requested by a law enforcement officer in accordance with § 91.17(c) of this chapter, or a refusal to furnish or authorize the release of the test results requested by the Administrator in accordance with § 91.17(c) or (d) of this chapter, is grounds for:

* * * * *

(b) Suspension or revocation of any certificate, rating, or authorization issued under this part.

§ 91.17 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft --

(1) Within 8 hours after the consumption of any alcoholic beverage;

(2) While under the influence of alcohol;

(3) While using any drug that affects the person's faculties in any way contrary to safety; or

(4) While having .04 percent by weight or more alcohol in the blood.

* * * * *

(c) A crewmember shall do the following:

(1) On request of a law enforcement officer, submit to a test to indicate the percentage by weight of alcohol in the blood, when --

(i) The law enforcement officer is authorized under State or local law to conduct the test or to have the test conducted; and

(ii) The law enforcement officer is requesting submission to the test to investigate a suspected violation of State or local law governing the same or substantially similar conduct prohibited by paragraph (a)(1), (a)(2), or (a)(4) of this section.

Administrator's appeal and grant respondent's appeal.

The Administrator's allegations stem from a series of events triggered by an investigation initiated by the United States Customs Service ("Customs"). On February 21, 2002, respondent was the pilot-in-command of a Learjet 25B, N128TJ, that landed at Fort Lauderdale-Hollywood International Airport after departing San Jose, Costa Rica. Respondent and his co-pilot, Johannes Mostert, were the only persons aboard the aircraft. After landing and proceeding to the ramp for processing by Customs, who had received a tip that the flight crew of N128TJ might be using narcotics, respondent was observed by several Customs agents, and, subsequently, Broward County Deputy Sheriff Winfield Phillips, a member of the Sheriff's Office DUI Task Force who responded to the airport at the request of the Customs agents, who believed respondent was impaired.³ Deputy Phillips administered to respondent a field sobriety test, during which he observed that respondent was unable to maintain a starting position, there were gaps when respondent attempted to walk heel-to-toe, respondent stopped when not instructed to stop, and, during the one-leg stand, respondent put his other foot down, swayed, and put his arms out. According to Deputy Phillips, respondent failed four of the various field sobriety tests Deputy Phillips administered at the airport, and, because he concluded

³ Respondent claimed at the hearing that after landing he took prescription medication containing codeine which he had been prescribed for a shoulder injury. Respondent introduced at the hearing his doctor's medical records showing that he was, in fact, being treated with this medication for a shoulder injury.

that respondent was impaired, he arrested respondent for operating an aircraft while intoxicated in violation of Florida law. Respondent was then transported to a Broward County Sheriff's Office testing center ("BAT facility"), where respondent submitted to a Intoxilyzer test, but did not submit to requested blood and urine tests. The Intoxilyzer test, which analyzes the percentage by weight of alcohol in the blood, was administered to respondent twice, within several minutes, and both tests returned a 0.00 reading.

The law judge found that Deputy Phillips lawfully arrested respondent, based on observations of behavior that gave Deputy Phillips cause to believe that respondent had operated the aircraft, contrary to Florida law, while under the influence of alcohol, narcotics or other controlled substances. The law judge also found that Deputy Phillips' request that respondent submit to Intoxilyzer, blood and urine tests were made incident to a lawful arrest. The law judge further found, essentially, that in addition to the Intoxilyzer test, which measures only blood-alcohol content, a blood screen can be used to evaluate both the presence of drugs as well as the percentage by weight of alcohol in the blood. Finally, the law judge credited Deputy Phillips' testimony that before departing the airport for the BAT facility respondent told Deputy Phillips that he would submit to a Intoxilyzer test, but not a blood or urine test. The law judge also found that even though respondent's Intoxilyzer tests returned 0.00 readings, and, therefore, "Deputy Phillips'

suspicion centered on the possibility that a drug of some sort" was the cause or respondent's apparent impairment, alcohol had still not been "conclusively ruled out." He reasoned that the requested blood test "would also have shown whether alcohol was present in [r]espondent's blood." Accordingly, the law judge concluded that the Administrator proved the regulatory violations in her Amended Complaint.

On appeal, the Administrator argues that the law judge erred by imposing a suspension instead of the revocation she ordered.⁴ In his appeal, respondent argues, among other things, that the law judge incorrectly concluded that FAR section 91.17(c)(1) "can be violated by refusing further testing once a respondent has shown an absence of alcohol in his blood by submitting to a breath test."

We address, first, respondent's argument that the law judge erred in upholding the section 91.17(c)(1) violation, for it is a threshold issue. As a matter of regulatory construction, in order for respondent to be shown to have violated section 91.17(c)(1) it must be proved, among other things, that respondent did not submit to a test to indicate the percentage by

⁴ The Administrator's original complaint also charged respondent with violations of FAR section 91.17(a)(3), which prohibits an airman from acting as a required crew member of a civil aircraft while using any drug that affects his or her faculties in any way contrary to safety, and FAR section 91.19(a), which prohibits an airman from operating a civil aircraft with knowledge that narcotics are aboard the aircraft. At the beginning of the hearing, the Administrator, without explanation, amended her complaint by removing the alleged violations of FAR sections 91.17(a)(3) and 91.19(a) and proceeding only on the FAR sections 91.16(b) and 91.17(c)(1) charges.

weight of alcohol in the blood, *provided that*: (1) the law enforcement officer requesting the test is authorized by State or local law to conduct the test or have the test conducted, and (2) the law enforcement officer is requesting submission to the test to investigate a suspected violation of State or local law governing *alcohol*-impaired operation of a civil aircraft. We also note that FAR section 91.17(c)(1)(ii) explicitly references subparagraphs (a)(1), (a)(2) and (a)(4), which set forth prohibited alcohol-related activity by flight crew members. Subparagraph (a)(3), which prohibits flight crew members from operating an aircraft "while using any drug that affects the person's faculties in any way contrary to safety," is specifically not referenced by section 91.17(c)(1)(ii).

In addition to the facts already set forth, this record makes it clear that when Deputy Phillips responded to the airport, he was informed by Customs agents that they had received a tip that the crew of N128TJ might be using narcotics and that, upon further investigation, the Customs agents had identified cocaine residue in a plastic baggie aboard the aircraft.⁵ Deputy

⁵ Customs agents found the baggie containing cocaine residue in a flight-gear bag belonging to co-pilot Mostert. Mostert claimed the bag had contained batteries that had leaked. Mostert was also believed by customs agents and Deputy Phillips to exhibit signs of impairment, and he too was administered and failed a field sobriety test by Deputy Phillips and subsequently arrested and transported to the BAT facility. Mostert's Intoxilyzer tests also returned 0.00 readings, and he submitted to the requested blood and urine tests which returned negative results for narcotics or other controlled substances. Local prosecutors have, apparently, declined to prosecute respondent or Mostert. A detailed search of N128TJ also turned up no evidence of narcotics, aside from the residue found in the baggie with

Phillips testified that he did not smell alcohol on respondent's breath, but he also testified that at the time he placed respondent under arrest he was uncertain whether the suspected impairment was due to alcohol, narcotics or some other substance. Deputy Phillips testified that it is standard practice for his unit to proceed to a BAT facility for testing under such circumstances to determine the source of impairment. He further testified that upon reaching the BAT facility, he first asked respondent to submit to an Intoxilyzer test, which respondent submitted to. The Intoxilyzer test was administered by Broward County Sheriff's BAT facility technician Susan Jones, who testified that she also observed signs of impairment but did not smell alcohol on respondent's breath. Jones testified that she observed respondent to be "very, very fidgety," that he "kept sniffing and sucking on his teeth" and that he was "very talkative, pacing all around." She indicated that generally that type of behavior indicates an individual is "taking some kind of stimulant." Jones also testified that after the Intoxilyzer tests returned readings of 0.00, indicating that "there was no alcohol in [respondent's] system," Deputy Phillips' request for a blood and urine screen was for the purpose of looking for other sources of impairment, such as drugs. Deputy Phillips also testified that when he is investigating suspected impairment, the first test he performs is always an Intoxilyzer test, and that

(..continued)

Mostert's flight gear, and the aircraft was released the following morning.

after respondent's Intoxilyzer test indicated a "triple zero" reading, he suspected "drugs" were the cause of respondent's observed impairment. Deputy Phillips testified that because of the Intoxilyzer test results, when he next asked respondent to submit to urine and blood testing, "we realized that it was not alcohol in his system."⁶ In other words, it is clear that respondent submitted to "a test to indicate the percentage by weight of alcohol in the blood" when he submitted to the Intoxilyzer test, and that, when he refused to submit to a blood or urine test, those tests were not being requested by Deputy Phillips "to investigate a suspected violation of State or local law governing the same or substantially similar conduct prohibited by paragraph (a)(1), (a)(2), or (a)(4) of this section," but, rather, a suspicion of impairment by drugs.

While we are troubled by the evidence suggestive of drug use during the operation of an aircraft, and do not wish to place our imprimatur on respondent's lack of cooperation with law enforcement officials in their attempt to establish his sobriety in accordance with Florida's aircraft-specific laws, the Administrator's withdrawal at the start of the hearing of her other charges removed from this case any regulatory basis for a drug-related violation finding. Thus, because the law enforcement officer was clearly not investigating alcohol

⁶ The law judge's finding that "alcohol had not been ruled out as a cause of respondent's impairment" after the Intoxilyzer tests returned 0.00 readings is, therefore, not supported by the preponderant evidence.

impairment when respondent refused to submit to blood and urine testing, we are constrained, by the clear language of section 91.17(a)(1), to find in favor of respondent.

Because we agree with respondent, at least on this record, that he has not been shown to have violated section 91.17(c)(1), all other issues raised by the parties on appeal are rendered moot. Accordingly, the Administrator's Emergency Order of Revocation is reversed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;
2. Respondent's appeal is granted; and
3. The Administrator's Amended Emergency Order of Revocation is reversed.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.